BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: BRANDON T, Claimant, vs. REGIONAL CENTER OF ORANGE COUNTY, Service Agency.	OAH No. 2012050644

DECISION

Administrative Law Judge Deborah M. Gmeiner of the Office of Administrative Hearings heard this matter on November 28, 2012 and January 11, 2013, in Santa Ana, California.

Brandon T. (Claimant) was represented by his father and his mother.[1] Claimant attended both days of the hearing.

Paula Noden, Manager, Fair Hearings and Vendor Appeals, represented Regional Center of Orange County (RCOC or Regional Center). Glenn Mijares, Peter Himber, M.D., Frances Munguia, Psy.D., and Kyle Pontius, Ph.D. attended and testified at the hearing.

The matter was submitted for decision on January 11, 2013.

[1] Claimant, his father and mother are identified by first name and last initial to protect their privacy.

ISSUE

Is Claimant eligible for regional center services by reason of a developmental disability within the meaning of the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code § 4500 et seq.)?[2]

FACTUAL FINDINGS

Background

1. Claimant is a six and a half year old boy who lives with his father and mother. Claimant is an only child. Claimant was born full term with no significant pre-natal or post-natal complications. He has a history of asthma and multiple allergies and takes antihistamines and uses an inhaler to help control these conditions. He is in good health although he has some problems with gagging and vomiting. Parents believe Claimant has autism.

2. In February 2012, parents requested that Claimant be made eligible for Regional Center services on the basis of autism.[3] Initially, the Regional Center eligibility review team considered information obtained from the Garden Grove Unified School District (District) Multidisciplinary Assessments completed in 2011 and 2012, a July 2011 neuropsychological assessment completed by Priscilla Armstrong, Psy.D. (Armstrong Report) and a February 2012 social assessment completed by Glen Mijares, Intake Service Coordinator (Social Assessment).

3. By letter dated April 12, 2012, the Regional Center gave notice of its proposed action (NPA) denying Claimant's request for eligibility, having concluded that Claimant does not have autism or any other developmental disability that would qualify him for Regional Center services.

4. Claimant's parents submitted a Fair Hearing Request (FHR) on Claimant's behalf on May 4, 2012, which appealed the Regional Center's denial of eligibility. In or about October 2012, Parents submitted to Regional Center a report prepared by Pantea S. Hannauer, M.D., a Board Certified neurologist with a subspecialty in child neurology (Hannauer Report). Dr. Hannauer's Report included a report by Elyse Schoenwald, M.S.N., CPNP.[4]

5. In October 2012, the Regional Center reviewed Dr. Hannauer's Report and found Dr. Hannauer's conclusions did not support a finding that Claimant is eligible for

[2] All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

[3] Claimant does not assert that he is eligible on the basis of mental retardation, cerebral palsy, a seizure disorder, or the "fifth category."

[4] Certified Pediatric Nurse Practitioner.

Lanterman Act services. Peter Himber, M.D., RCOC's Chief Medical Officer, suggested Regional Center offer the family a Transdisciplinary Assessment (TDA) to assist in determining eligibility.

6. Drs. Himber and Frances Munguia, Psy.D. conducted the TDA on October 26, 2012. After considering the results of the TDA, Regional Center again concluded that Claimant was not eligible for Lanterman Act services. This hearing ensued.

Claimant's Educational History

7. (A) Claimant attended Kid's Corner Preschool from August through October 2010, and Greenhouse Preschool from October 2010 until at least March 2011. Claimant attended formal kindergarten in the District. During the summer of 2012, Claimant attended a 15-hour per week therapy program through Pediatric Minds, Early Childhood Treatment Center (ECTC). During that time, parents noted some improvement in his behavior but he was still having difficulty generalizing what he was learning.

(B) District conducted a Multidisciplinary Assessment (MDA) in March 2011 and at parents' request, a Multidisciplinary Reassessment (MDRA) in November 2011 through January 2012. An Individualized Education Plan (IEP) team meeting was held on March 2011 and Claimant was determined to be not eligible for special education services. Another IEP team meeting was held on November 28, 2011 and January 2012. A further IEP meeting was scheduled to occur but no evidenced was produced regarding this meeting. At the time of the hearing on this matter, Claimant was enrolled as a special education student in a general education classroom for gifted and talented students. The MDA and MDRA as well as the 2011 and 2012 IEP's were received into evidence. No witnesses from the District were called to testify during the hearing.

District's March 2011 Multidisciplinary Assessment (MDA) and IEP

8. (A) On March 8, 2011, District evaluated Claimant for special education services in the area of speech and language. He was four years, seven months old at the time. Julia Campen, M.S., CCC-SP[5] conducted the evaluation(Campen Report). Ms. Campen observed that Claimant separated easily from his mother and attended to and focused on the test materials. He pranced on his tip-toes briefly and was visually distracted.

(B) Ms. Campen administered the Goldman-Fristoe-2 Test of Articulation (GFTA-2), and an oral mechanism screening. On the GFTA-2, a test of developmental sounds from three years to 7.8 years, Claimant received a standard score of 113 and an age equivalent of 5.6 years, placing him in the 70th percentile. On the oral mechanical screening, an informal assessment of how well an individual can voluntarily move the tongue, lips, jaw, and facial musculature for speech sounds, Claimant had some difficulty with some mechanism for speech sounds. Ms. Campen did not independently assess Claimant's language skills but noted they were in the superior range according to the school psychologist. She further noted Claimant did not exhibit disabilities with expressive or

[5] Certificate of Clinical Competence, Speech Pathology

receptive language skills. Ms. Campen concluded Claimant does not qualify for special education instruction in the area of speech and language. Mother was provided with a reward board to help shape Claimant's behavior.

9. (A) As part of the March 2011 MDA, Claimant was also assessed by Lily Perry, School Nurse, and Laurie Eberhard, School Psychologist (Eberhard Report). Ms. Lily and Eberhard reviewed available records, obtained information from mother, observed Claimant, and obtained a health and developmental history. Ms. Eberhard administered the Wechsler Preschool and Primary Scale of Intelligence, Third Edition (WPPSI-III) and the Attention Deficit/Hyperactivity Disorder Test (ADHDT).

(B) Claimant's general health was described as good. His developmental milestones were as follows: sat alone - 8 months; crawled - 10 months; walked alone – 17 months; first words - 2 ½ years; simple sentences – 3 years; potty trained - 3 ½ years; gave up bottle – still on bottle; fed self – able to feed self but not all the time/mom feeds; dressed self – not independent; and began pre-school – 4.2 years. Mother reported early behavioral concerns and possible Attention Deficit Hyperactive Disorder (ADHD). Behavioral concerns included hyperactivity, difficulty sitting for simple tasks, short attentions span, problems following instructions, problems completing a task, easily frustrated, explosive temper, cries easily, and sleep problems.

(C) Ms. Eberhard observed Claimant to easily separate from his mother at the testing session. He generally demonstrated an adequate attention to task and cooperation, although he required redirection at times. After a break, he was able to return to the test table with a verbal request. His attention to task was better with tasks of interest to him. His eye contact was adequate. He smiled and gave the Ms. Eberhard a high five with his successes. His interaction with examiner was appropriate, answering questions, and making comments of his own.

(D) On the WPPSI-III, a test of intellectual functioning, on the Verbal Scales, Claimant obtained a standard score of 137, placing him in the 99th percentile. On the Performance Scales, Claimant obtained a standard score of 101, placing him in the 53rd percentile. Claimant's pre-academic skills were also assessed. He was able to count to 50, at which point the examiner switched to another task. His mother reported he is able to count to 100. He understood the concepts of one, two, three, and four. Again at that point the examiner changed the task. He knew his colors and the letters of the alphabet. He was able to independently write his name and copy the word "cat." There were no reported gross motor concerns. Ms. Earnhard also observed that Claimant's verbal abilities were in the superior range.

(E) The ADHDT was administered to determine the probability that Claimant suffers from ADHD. The ADHDT is a norm referenced test which compares a child to persons known to have ADHD. Mother rated Claimant. According to Ms. Eberhard, Claimant has an average probability of ADHD.

(F) Ms. Perry and Ms. Eberhard concluded that Claimant did not appear to meet eligibility criteria for special education although the ultimate determination was referred to the March 15, 2011 IEP team meeting. At that meeting the IEP team determined that Claimant had no areas of unique need that would require special education services. Mother consented to the determination.

District's November 2011-January 2012 Multidisciplinary Reassessment (MDRA)

10. At parents' request, District reassessed Claimant to determine eligibility for special education in November 2011 through January 2012. The MDRA included a psychoeducational assessment conducted by Dennis Dierck, School Psychologist (Dierck Report), and a speech and language evaluation completed by Greg Roberson, M.A., CCC-SP (Roberson Report). An independent occupational therapy evaluation performed by Ms. Caroline Persek was also considered by the IEP team. (Persek Report)

11. (A) Mr. Dierck observed Claimant on three occasions in his classroom and during recess. He also reviewed school records, the Armstrong Report, considered information provided by parents, and administered the Asperger Syndrome Diagnostic Scales (ASDS), the Gilliam Asperger Syndrome Diagnostic Scale (GADS), the Childhood Autism Rating Scale, Second Edition, (CARS-2), the Test of Early Mathematics Abilities, Third Edition (TEMA-3), the Test of Early Reading Abilities, Third Edition (TERA-3), and the Vineland Adaptive Behavior Scales, Second Edition (Vineland-2).

(B) On the TERA-3, Claimant obtained a Reading Quotient standard score of 162, placing him in the very superior range. On the TEMA-3, Claimant obtained a Math Ability score of 140, placing him in the very superior range. Claimant's teacher reported that Claimant was on track to meet all of his kindergarten standards.

(C) Claimant's teacher completed the ASDS. On that measure, the teacher rated Claimant as in the possible range for Asperger Syndrome.[6] Problems were noted on each of the subscales: Social, Language, Maladaptive, Cognitive, and Sensorimotor. Mr. Dierck noted when parents completed the same rating scale as part of Dr. Armstrong's assessment, they rated Claimant as "unlikely" for having Asperger Syndrome. The GADS was completed by Claimant's teacher. Based on the teacher's responses, Claimant was in the high/probable range for Asperger Disorder. Problems were noted on the four subscales: Social Interaction, Restricted Patterns of Behavior, Cognitive Patterns, and Pragmatic Skills. Mr. Dierck noted when parents completed the GADS as part of Dr. Armstrong's assessment, they rated Claimant in the low probable range for Asperger Syndrome.

(D) The Vineland-2 is a measure of adaptive behavior and self-help skills. As rated by parents, Claimant was in the adequate range for Communication, the moderately

[6] The various reports and witness testimony appear to use the terms Asperger Disorder, Asperger Syndrome, and Asperger interchangeably. The DSM-IV uses the term Asperger Disorder. This decision will use the term as used by the examiners in the context of their reports and testimony.

low range for Daily Living Skills, the moderate deficit range for Socialization, and the mild deficit range for motor skills. He was in the mild deficit range on the Adaptive Behavior Composite and clinically significant range on the Maladaptive Behavior Composite. Claimant's teacher also rated Claimant using the Vineland-2. As rated by teacher, Claimant was in the adequate range for Communication, the adequate range for Daily Living Skills, the moderately low range for Socialization, and the moderately low range for range for Motor Skills. He was in the adequate range on the Adaptive Behavior Composite.

(E) Mr. Dierck completed the CARS-2 after completing other assessments and making formal and informal observations of Claimant. His overall impression was that Claimant has mild autism spectrum disorder. Mr. Dierck concluded Claimant met the special education criteria for autistic behavior.

12. (A) As part of the MDRA, Mr. Roberson conducted a speech and language evaluation in November 2011 and January 2012. Mr. Roberson administered the Goldman-Fristoe Test of Articulation-2 (GFTA-2), the Comprehension Assessment of Spoken Language (CASL) Pragmatic Judgment subtest, an Oral-Motor Screening Checklist, and a Fluency and Voice Screening Checklist. Mr. Roberson also interviewed staff and teachers, reviewed available records, used a speech and language sample, and observed Claimant. Claimant's articulation as measured by the GFTA-2 indicated some errors in sound, but his speech intelligibility was judged to be at 95-100% for phrases, depending on context and conversational partner. Claimant's voice and fluency (the ability to express oneself readily and effortlessly) appeared to be within functional limits. Prosody (the use of pitch, loudness, tempo, and rhythm in speech to convey information about the structure and meaning of an utterance) was within normal limits. With regard to fluency, Claimant did not demonstrate atypical pause, prolongations, repetitions, or secondary characteristics associated with stuttering behaviors.

(B) With respect to Claimant's expressive and receptive language skills, Mr. Roberson considered the Campen Report, the Dierck Report, observations made by Claimant's classroom teacher, and his own observations. Based on the available information, expressive and receptive language was not an area of suspected disability and Mr. Roberson did not evaluate Claimant using standardized assessment instruments in these areas. Mr. Roberson opined Claimant was in the average to above average range in all areas associated with expressive and receptive language. Mr. Roberson concluded it was expected Claimant will continue to succeed in his expressive and expressive language skills as he matures and grows.

(C) Mr. Roberson assessed Claimant's social language. Social language includes functional use of language in social contexts and is called pragmatic language. Pragmatics refers to the underpinnings of conversation, such as how something is said, the relationship between the participants, the intent of the speaker, and the cultural and environmental expectations of the exchange. It is a complicated part of communication. Based on the Pragmatic Judgment subtest on the CASL and an informal pragmatics profile, Claimant had a mild to moderate weakness in pragmatics. Claimant had both strengths and weakness in the area of pragmatics. For example, while he was able to vary his behavior

according to the reactions of others, use simple words or phrases to express intention, but he had difficulty greeting a teacher and stating a farewell to an adult, and asking permission to use other's things. Typically, Claimant showed limited interest in interacting with others and instead enjoyed activities that he can be involved in independently. His attention to task was varied, depending on the context.

(D) Mr. Roberson concluded Claimant had a mild-moderate pragmatic language delay/disorder. Mr. Roberson stated Claimant's greatest challenge may be his limited awareness of self and how his actions affect others. His tendency to act impulsively with others may limit his ability to form appropriate relationships.

13. (A) On November 9, 2012, Claimant was evaluated by Caroline Persek, O.T. R/L[7]. Claimant was evaluated to determine his sensory processing and fine motor skills as they related to his educational performance.

(B) Ms. Persek administered the Sensory Processing Measure (SPM), and the Bruininks-Oseretsky Test of Motor Proficiency-Second Edition (BOT-2), Fine Motor, Fine Motor Integration, and Manual Dexterity subtests. The SPM was completed by Claimant's teacher. Rating categories are typical (t-score 40-59), some problems (t-score 60-69, may indicate occasional negative reactions), and definite dysfunction (t-score 70-80, indicates significant problems). Overall Claimant received a t-score of 62, indicating some problems with overall sensory processing skills in the classroom. He received a definite dysfunction rating for Social Participation and a typical rating for Hearing. His score was in the some difficulty range for Vision, Touch, Body Awareness, Balance and Motion, and Planning and Ideas.

(C) On the BOT-2, Claimant received an average score on the Fine Manual Control portion of the test. On the test of Manual Coordination, he received an overall rating of well below average. He received an average on Manual Dexterity subtest and a well below average on Upper Limb Coordination subtest.

(D) Ms. Persek concluded Claimant has some problems with overall sensory processing skills and average to well below average fine manual control and manual processing skills. He demonstrates poor motor planning skills and bilateral motor control. Ms. Persek recommended Claimant receive occupational therapy services.

14. IEP team meetings were held on November 28, 2011 and January 13, 2012.[8] The latter meeting was continued to another date, but no record of any further proceedings was offered into evidence. Claimant was found eligible for special education services on the basis of autism (Ed. Code § 56846.2) and speech and language deficits due to mild to moderate social language impairment (Ed. Code §56333). Claimant was designated to

[7] Occupational Therapist, Registered, Licensed.

[8] Several pages of the November 28, 2011 IEP were not attached to Regional Center's Exhibit 8. From the context of the documents, the missing pages appear to relate to a determination of unique needs in the educational setting.

participate in a general education classroom with modification. Goals were developed in the areas of fine motor skills (grasp), sensory processing (body awareness and motor planning), and social language (appropriate eye contact, verbal exchange, and turn and verbally respond to his name). At the time of the hearing, Claimant was in a gifted and talented classroom with modifications.

Other Assessments and Evaluations

15. Claimant was evaluated by Dr. Priscilla Armstrong in April 2011, Dr. Pantea Sharifi Hannauer in July 2012, Ms. Vivian Hsu in August 2012, and Dr. Myah Gittleson in October 2013.

Dr. Armstrong's July 2011 Neuropsychological Assessment

16. (A) Claimant was four years old when evaluated by Dr. Armstrong. The purpose of the assessment was to further an understanding of Claimant's social, emotional, and cognitive functioning, and to make treatment and educational recommendations. Mother's primary concern at the time was ADHD. Dr. Armstrong's Report was received into evidence; she did not testify at the hearing.

(B) Claimant was then attending a pre-kindergarten Montessori school. Parents anticipated that Claimant would be attending kindergarten in the fall of 2011. Dr. Armstrong noted mother described Claimant's developmental milestones as within normal limits, but a District report indicated Claimant was on the slightly delayed end of normal limits. Dr. Armstrong noted that Claimant had completed a kindergarten assessment in June 2011 indicating that Claimant was kindergarten ready but exhibiting difficulty sitting in his chair and keeping his hands to himself. Problems were noted in his social interactions including problem solving, conflict resolution, problems establishing peer relationships, and role-taking which is the perception and understanding of a situation from the point of view of others involved in an activity. He also had problems with completing activities and utilizing practical skills. The kindergarten assessment found Claimant's physical development, sensory education, and language arts skills to be within normal limits.

(C) Dr. Armstrong also reviewed the results of the District's March 2011 MDA and an assessment by the Learning RX on March 12, 2011. According to Dr. Armstrong, Learning RX indicated concern with attention, processing speed, and oppositional behavior.

(D) Dr. Armstrong assessed Claimant using a clinical interview and mental status examination, and the Child Behavior Checklist-Parent Form and Teacher Form (CBCL), Connors' Parent Form, Asperger Syndrome Diagnostic Scale (ASDS), Gilliam Asperger Disorder Scale (GADS), Beery-Buktenica Test of Visual-Motor Integration, Behavior Rating Inventory of Executive Function (BRIEF), Motor-Free Visual Perceptual Test-3rd edition, Wechsler Preschool and Primary Scale of Intelligence (WPPSI-III), Wechsler Individual Achievement Test-III (WIAT-III), and the Wide-Range Assessment of Memory and Learing-2 (WRAML-2).

(E) Dr. Armstrong reported that Claimant easily established rapport with her. He was easily distractible and required redirection throughout the evaluation. He displayed poor focus and needed to shift activities quickly. He often "spun" on his chair, explaining to the examiner that he needed to do so. He lacked appropriate eye contact. He was very fidgety and demonstrated lack of emotional reciprocity at times during the evaluation. Claimant had a hard time separating from the Lego's in the office. He climbed on the examiner's lap and at one point rubbed her leg, apparently to help him focus. Once redirected, he appeared to lose focus and got up to walk around the room.

(F) Dr. Armstrong noted Claimant's speech appeared adequate and that he exhibited some slight echolalia. Dr. Armstrong noted a robotic voice tone at the beginning of the session, which dissipated over time. His verbal comprehension was adequate and his vocabulary was very rich for his age. His thought process was described as clear and goal directed, and there was no evidence of hallucinations, delusions, or other abnormal ideation. His mood and affect were appropriate. Dr. Armstrong concluded that testing results were considered a valid and reliable representation of Claimant's current cognitive functioning.

(G) On the WIPPSI-III, Claimant received a full scale IQ of 123, placing him in the superior range for his age. His Verbal Comprehension composite score was 129, placing him in the superior range. His Performance composite was 114, placing him in the high average range. On the Processing Speed Index, Claimant obtained a score of 113, in the high average range. Claimant's General Language skills score was 113, also in the high average range for his age. A significant discrepancy was noted between his receptive language skills and information skills, likely due to Claimant's strong academic achievement as represented by his performance on the Information subtest.

(H) The results of the WIAT-III indicated Claimant's overall achievement was well within to above expected levels. His lowest area of functioning was Listening Comprehension and was likely impacted by his poor focus and attention skills.

(I) Claimant's nonverbal reasoning skills were in the high average range. On the BRIEF, an inventory completed by mother, Claimant was identified as having difficulty managing his emotions and behavior, planning and organizing his approach to problem solving, poor impulse control, and poor sustained attention.

(J) Overall, Claimant was within the average to above average range on tasks involving visual scanning, visual spatial processing speed, and graphomotor speed. His visual-motor integration skills on a copy-drawing task were average but his work indicated some fine motor deficits. His fine motor speed was below normal limits. On the Motor-Free Visual Perception Test-3 Claimant's score was in the average range for his age, with some deficits noted with figure-ground and visual closure.

(K) Claimant obtained a high average score on a test of vocabulary. His receptive language skills were in the average range; his expressive language was in the superior range.

(L) On the WRAML-2, a test of learning and memory, Claimant was in the average to high average range except for his ability to immediately recall details of stories and his ability to recall the stories after 20-minutes, both of which were in the borderline range. On tasks of visual memory and memory for attention to details with pictures presented to him both immediately and after 20-minutes, Claimant scored in the high average to superior range. Dr. Armstrong concluded that Claimant shows strength with memory for visually presented material. With verbally presented material, Claimant performs best with concrete information. It was likely Claimant became overwhelmed when too much verbal information was presented at once.

(M) Mother completed the Connors' Parent Form, an inventory designed to assess ADHD. Mother rated Claimant in the clinically significant range with hyperactivity, inattention, impulsivity, and overall ADHD symptoms.

(N) On the ASDS, a test designed to assess autism spectrum disorders, Claimant's mother rated him in the unlikely range for Asperger Syndrome. Mother did indicate some symptoms of Asperger including talking on a favorite topic, difficulty in relating to others, not respecting the personal space of others, difficulty with social cues, engaging in obsessive behaviors, frequent temper tantrums, unusual reaction to loud unpredictable noise, appears clumsy or uncoordinated, and other similar characteristics. Mother also described Claimant as superior intellectually in restricted areas of interest with average to above average skills in other areas, as having excellent rote memory, and as lacking common sense. On the GARS, also designed to assess autism spectrum disorders, Claimant placed in the low probable range, although mother rated some areas of concern on this inventory.

(O) On the CBCL, a checklist designed to assess behavioral functioning, mother reported significant problems with focusing, sitting still and concentration, difficulty with falling asleep, and showing symptoms of anxiety. Mother also reported problems with sharing, quickly shifting from one task to another, and temper tantrums. Claimant's teacher indicated on the CBCL that Claimant avoided eye contact, was impulsive and cannot concentrate, focus, and sit still. Teacher reported difficulty following directions, getting along with peers, and becoming easily frustrated. Difficulty separating from parents, stubbornness, unpredictable behavior, being unusually loud, and difficulty with transitions were also reported by teacher.

(P) Dr. Armstrong concluded that Claimant's neuropsychological profile and reported history met the criteria for a Diagnostic and Statistical Manual-IV-TR (DSM-IV)[9] diagnosis of Asperger Disorder. She also recommended ruling out ADHD and

[9] The Administrative Law Judge (ALJ) takes official notice that the Diagnostic and Statistical Manual of Mental Disorders (4th edition, 2000, American Psychiatric Association), also known as the DSM-IV-TR (TR, for text revision)), is a well-respected and generally accepted manual listing the diagnostic criteria and discussing the identifying factors of most known mental disorders. Official notice is also taken of the DSM-IV diagnostic criteria for Autistic Disorder, Asperger Disorder, Pervasive Developmental

Hyperlexia.[10] According to Dr. Armstrong, Asperger Disorder is distinguished by a pattern of symptoms characterized by qualitative impairment in social functioning, stereotyped and restricted patterns of behavior, activities and interests, and by no clinically significant delay in cognitive development or general delay in language. The disorder may also include intense preoccupation with a narrow subject, restricted prosody, one-sided verbosity, and physical clumsiness, although these are not required for diagnosis. According to Dr. Armstrong, unlike people with autism, people with Asperger are not usually withdrawn around others; they approach others, although it may be awkwardly. Their demeanor may appear rigid or socially naive. In addition, people with Asperger often display unusually intense or focused interest and restricted and repetitive behavior, interests and activities. Individuals with Asperger Disorder acquire language without significant general delay, and without significant abnormalities. Language acquisition and use is often atypical. Communication may involve poor prosody, tangential and circumstantial speech, and marked verbosity. Children with Asperger Disorder may have an unusually sophisticated vocabulary at a young age, but have difficulty with figurative language and tend to be literal in their use of language.

Dr. Hannauer and Ms. Schoenwald's Assessment

17. (A) Dr. Hannauer saw Claimant on three occasions in July 2012. Ms. Schoenwald, Dr. Hannauer's nurse practitioner, also evaluated Claimant. Dr. Hannauer and Ms. Schoenwald are affiliated with Pediatric Minds, ECTC, a pediatric service provider in Torrance California. Dr. Hannauer's Report was received into evidence. Neither Dr. Hannauer nor Ms. Schoenwald testified. The purpose of the consultation was stated as "Autism." Dr. Hannauer's report includes parents' statement of Claimant's present illness as well as a neurologic and physical examination of Claimant and Ms. Schoenwald's report. Nothing in Dr. Hannauer or Ms. Schoenwald's report indicates they reviewed Armstrong's report, the Learning RX report, or the District's reports. According to mother, until age three and a half, Claimant was more engaged and aware. At three and a half, mother described what Dr. Hannauer characterized as "acute regression' in Claimant's behavior and expressive language. However, Dr. Hannauer reported that father did not feel Claimant had any major regression in his development.

(B) Dr. Hannauer observed Claimant to be talkative with good articulation. The topics of his speech were restricted to things of interest to him. He answered to his name and to some questions, knew his body parts, and colors and animals, and was reading at the third grade level. Claimant was loud and had difficulty modulating his voice. He was able to follow simple commands but had difficulty with multi-step commands. He had scripted phrases and perseverated. Parents reported repetitive behaviors, fixation on trains, butterflies,

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disorder Not Otherwise Specified (PDD-NOS). Official Notice is also taken that "autism spectrum" includes Autistic Disorder, Asperger Disorder and PDD-NOS, three of the five diagnosis coming with the DSM-IV category of Pervasive Developmental Disorders.

[10] The ALJ takes official notice that a "rule out" notation is commonly used to denote that a diagnosis should be removed from current consideration.

planets, and angry birds, and lining up objects. He liked to stick to a routine, could be argumentative, and was very set in his ways. He engaged in some self-stimulating behavior. Claimant had limited imaginary play. He collected things of interest. He liked video games. Claimant had some fears and was afraid of some people. He was afraid of the dark. Claimant was easily distracted and needed constant redirection and supervision. He was impulsive and overstepped his social boundaries. He had poor safety awareness and would run off and go up to strangers.

(C) According to Dr. Hannauer, Claimant was observed to have difficulty with social skills. He could be disengaged, on his own and not interested in other children. His sharing and turn taking skills were improving. He had limited social recognition and poor empathy. He needed prompting for social gatherings. He did not ask for play dates, but did notice if another child wanted to play with him, although he was not able to engage with them directly. Claimant had temper tantrums that were easily triggered. He would throw himself to the ground, break things, and infrequently kick. His affect fluctuated and he was not stoic. Claimant pointed and had joint attention (back and forth exchanges relating to an object or event).

(D) Ms. Schoenwald administered the ADOS. The ADOS is a semi-structured assessment of communication, social interaction, and play and the imaginative use of materials for individuals suspected of having autism. Ms. Schoenwald states that she administered the ADOS-Module 2 which is intended for children who use phrase speech but are not yet verbally fluent, but reported the results of the ADOS-Module 1. Because Ms. Schoenwald did not testify, it is not known if this is a typographical error or if Ms. Schoenwald administered Module 2 but scored it using Module 1. Ms. Schoenwald reported the following scores on the ADOS-1: Communication total of 7 (Autism cut-off=5, Autism Spectrum cut off=3); Social Interaction total of 14 (Autism cut-off=6, Autism Spectrum cut off=4); Communication+Social total of 21 (Autism cut-off=12, Autism Spectrum cut off=8); Play total of 2; and Stereotyped Behaviors and Restricted Interests total of 3. On the ADOS, the higher the score, the more likely the individual is to have autism.

(E) Ms. Schoenwald's report includes a list of descriptors that she characterizes as the DSM-IV criteria for diagnosing Autistic Disorder, but which are different from the criteria listed in the DSM-IV. Based on the criteria she used, Ms. Schoenwald concluded Claimant met four criteria under the Social Impairment section, four criteria under the Communication Impairment section, and two criteria under the Restricted or Repetitive Activities section.

(F) Based on Dr. Hannauer's neurological and physical examination, her observations of Claimant, Claimant's medical and developmental history, and Ms. Schoenwald's report, Dr. Hannauer concluded that Claimant met the DSM-IV criteria for Autistic Disorder.

Vivian Hsu's Speech and Language Assessment

18. (A) Vivian Hsu, M.A., CCC-SP completed a speech and language evaluation August 14, 2012 when Claimant was almost six years old. (Hsu Report) Ms. Hsu is affiliated with Pediatric Minds. Ms. Hsu's Report does not indicate whether she reviewed Ms. Campen or Mr. Roberson's Reports. Ms. Hsu reported Claimant's family is bilingual Vietnamese-English but Claimant's primary language of choice is English. At the time of the evaluation, Ms. Hsu reported Claimant was receiving school based speech and language services as well as clinic based occupational therapy services. The purpose of Ms. Hsu's evaluation was to describe Claimant's speech performance. Ms. Hsu's Report was received into evidence but Ms. Hsu was not called to testify.

(B) Claimant required minimal support to enter the testing room and begin testing procedures. Claimant appeared well rested and alert. The evaluation took 90 minutes and Claimant completed the entire test. Claimant was able to transition between activities with minimal to no support. Claimant moved his hands and feet while sitting. He was offered an object to hold and sensory breaks if he appeared tired. He often required cues to stay on task.

(C) Ms. Hsu described Claimant as alert and as sometimes using sentences to communicate his wants and needs to adults. He used facial affect, gestures, and words to support his messages. Joint attention skills (back and forth exchanges) with adults were observed. He gave correct answers to questions. He had a large vocabulary. His speech was fair, with some drooling and labored speech productions. His utterances were unclear at times when he was not sure what he wanted to say or when exposed to novel situations. When asked to clarify himself, he did so with minimal assistance.

(D) Claimant's functional communications skills, receptive language, and expressive language skills were evaluated using the Preschool Language Scale, Fifth Edition (PLS-5). Claimant demonstrated above average skills on auditory comprehension skills. One area of difficulty was in understanding "false beliefs" which required him to take the perspective of another person. In the area of expressive communication skills, Claimant received a score in the above average range. Ms. Hsu noted that Claimant was able to communicate his message when he was motivated to communicate. Sometimes he was distracted by watching his peers, which impacted his ability to formulate sentences.

(E) Claimant had mild articulation problems. His speech was marked by sound distortions, substitutions, and omissions. His overall clarity of speech was approximately 85 percent. Claimant's oral motor coordination difficulties suggested oral weakness and jaw instability. This also impacts his feeding skills. He had an immature chewing pattern, with his mouth open and often protruding his tongue to initiate a swallow. Claimant's vocal quality was within normal limits. He often stressed syllables in a sentence which are not typically stressed. He also spoke with a choppy flow. His speech was fluent.

(F) Claimant's pragmatic speech was clinically evaluated through observation. He demonstrated the verbal communication functions of greetings/salutations, requesting/refusing, affirming/negating/commenting, asking/responding to questions, giving simple information and some inference skills. His facial expressions supported his message

and he used varied facial expressions. His impulsive behavior impacted his social language skills. At times he got up to grab an item or drop a toy. He did not use language during those times to express what he wanted. Claimant did not exhibit awareness of others and their feelings. He had difficulty with perspective taking and interpreting other's emotions or feelings.

(G) In summary, Ms. Hsu described Claimant as having average to above average performance on formal language tests, as corroborated by clinical observation and staff report. His speech had errors due to poor oral strength and poor oral coordination. He had social language difficulties which impact his ability to interact with peers and adults. She also observed that his impulsiveness and poor body awareness impacted his social skills.

Myah Gittleson, Psy.D., Psychological Assessment

19. (A) A psychological assessment was completed by Myah Gittelson, Psy.D. on October 18, 2011 (Gittleson Report). Dr. Gittleson is affiliated with Pediatric Minds. Dr. Gittleson does not indicated in her report whether she reviewed any other reports regarding Claimant's functioning. Dr. Gittleson's report was received into evidence but Dr. Gittleson did not testify at the hearing. Claimant was six years, three months of age at the time Dr. Gittleson prepared her report. Claimant was initially seen on his first day at the ECTC during the summer of 2012. Claimant was observed to go with his assigned assistant with little trepidation. He was observed to have self-stimulatory behavior and to utter high pitched sounds. He bumped into things, had poor awareness of his personal space, and did not make eye contact with the assistant unless prompted. When directed to transition from a preferred activity, he experienced a "meltdown" but was able to be redirected within three to five minutes, with continued verbal perseveration. Dr. Gittleson again observed Claimant during a 30 minute increment of a social skills group on October 18, 2012. The group was comprised of children with a diagnosis on the autism spectrum. Claimant had problems focusing on the group activity. He was disruptive and required more supervision than his peers.

(B) Dr. Gittleson evaluated Claimant's cognitive functioning using the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV). He received a Verbal Comprehension standard score of 112, placing him in the high average range, and a Performance Reasoning score of 131, placing him in the very superior range. On the Working Memory subtest he received a standard score of 116, in the high average range. Dr. Gittleson did not calculate a full scale IQ because Claimant had difficulty with the Processing Speed subtest. Claimant scored below average on the Coding and Comprehension subtests.

(C) Parents completed the Adaptive Behavior Assessment System, Second Edition (ABAS-II), an inventory that provides observations across nine skill areas. Claimant scored average to superior in Communication, Community Use, and Functional Academics, low average in Leisure and very low (below expectations for his chronological age) in Home Living, Health and Safety, Self-Care, Self-Direction, and Social.

(D) Dr. Gittleson also administered the ADOS-2. Dr. Gittleson reported her observations of Claimant but did not report his scores. She reports that Claimant scored at a high level for autism. Dr. Gittleson also administered the Gilliam Autism Rating Scale, Second Edition (GARS-2). This rating scale was completed by parents. On the GARS-2, Claimant was rated as at risk for autism spectrum disorder.

(E) Based on the results of the Autism Diagnostic Interview-Revised (ADI-R), a structured interview tool, the Autism Spectrum Rating Scale (ASRS), the ADOS, and the other information obtained during the evaluation, Dr. Gittleson diagnosed Claimant with Autistic Disorder. Dr. Gittleson used the same criteria as Ms. Schoenwald in correlating her observations of Claimant with criteria to arrive at the diagnosis of Autistic Disorder. The criteria used by Dr. Gittleson are not the same as the DSM-IV criteria. Based on her criteria, Claimant met four of four criteria for Social Impairment, three of four criteria for Communication Impairment, and four of four criteria for Restricted or Repetitive Activities.

20. In a letter dated November 20, 2012, Dr. Gittleson suggested the differences in her diagnosis and the Regional Center's diagnosis may be due to Claimant being in an unfamiliar setting at the Regional Center, the limited timeframe given to the TDA, and the fact that Claimant was not observed interacting with peers. Dr. Gittleson observed that "children diagnosed with Autism Spectrum Disorders may present inconsistent behavior depending on the amount of structure provided and other environmental factors."(Claimant's Exhibit 5.)

RCOC Assessments and Witness Testimony

Social Assessment

21 Intake service coordinator Glen Mijares interviewed parents and Claimant on February 3, 2012. Mr. Mijares obtained a social and developmental history of Claimant and reported on his current functioning including self-care, motor, social/behavioral, cognitive, and communication. Parents disagree with some statements attributed to them in Mr. Mijares' report. Mr. Mijares' testified at the hearing and his Social Assessment was received into evidence.

Transdisciplinary Assessment (TDA)

22. (A) As suggested by RCOC, a TDA was completed by Drs. Himber and Munguia on October 26, 2012. Drs. Himber and Mungia reviewed and considered Claimant's medical records, District multidisciplinary assessments and IEP records, Dr. Armstrong and Dr. Hannauer's Reports, Ms. Persek and Ms. Hsu's Reports, and the Social Assessment. Drs. Himber and Munguia obtained a detailed history of Claimant from parents, and observed and interacted with him. Dr. Himber performed a neurological examination and Drs. Himber and Mungia administered the ADOS-2 and the CARS-2. Drs. Himber and Munguia evaluated Claimant's functioning in six areas of major life activity used to establish Lanterman Act eligibility (mobility, learning, self-direction, receptive and expressive language, self-care, and capacity for independent learning).

(B) On the ADOS-2, Claimant obtained a total score of 3 on Communication, 4 on Social Interaction, and a total score of 7 on the Communication+Social Interaction domains. On the Imagination/Creativity subsection, he obtained a total score of 0 and on the Stereotyped Behaviors and Restricted Interests subsection he also obtained a total score of 0. Claimant's score on both the Communications subsection and the Social Interaction subsections indicated a likelihood of autism spectrum disorder but his total score on Communication+Social Interaction did not indicate a likelihood of autism spectrum disorder. On the CARS, Drs. Himber and Munguia rated Claimant well below the autism cut off while parents rated Claimant in the mild to moderate autistic range.

(C) Drs. Himber and Munguia concluded Claimant is substantially disabled for purposed of Lanterman Act services in the area of self-direction. This activity encompasses an individual's ability to take responsibility for making independent personal decisions and social life choices, including managing emotions, seeking assistance when needed, and demonstrating appropriate assertiveness and self advocacy skills.

(D) Drs. Himber and Munguia concluded Claimant is not substantially disabled in the areas of mobility, learning, self-direction, receptive and expressive language, self-care, and capacity for independent learning. Because Claimant does not contend he is substantially disabled in the area of mobility, this area need not be discussed in this decision. Suffice it to say Claimant is ambulatory and able to navigate without limitations.

(E) Self-care involves skills associated with toileting, eating, dressing, hygiene, and grooming. While Drs. Himber and Munguia noted Claimant is somewhat delayed in his age appropriate self-care and grooming, they nonetheless concluded Claimant is not substantially disabled in self-care. In arriving at this conclusion, Drs. Himber and Munguia noted the results of the Vineland-2 reported in Dierck's Report and the 2012 IEP which found Claimant's Adaptive/Daily Living Skills were not an area of unique need. Parents disagreed with several descriptions of Claimant's self-care skills attributed to them and relied upon by Drs. Himber and Munguia in this area. For instance, they noted Claimant continues to have toileting accidents and has difficulty with dressing.

(F) Learning is the ability to acquire knowledge or skills through study, instruction, and experience. According to Drs. Himber and Munguia, the determination of a substantial disability in learning involves measuring the potential to learn, including intellectual abilities and academic achievement. Dr. Himber and Munguia concluded Claimant is not substantially disabled in the major life activity of learning. In arriving at this conclusion, Drs. Himber and Munguia noted their observations of Claimant as well as the results of the WPPSI-III administered by Dr. Armstrong and by the District and the WIAT-III administered by the District, which placed Claimant in the average to very superior range for intellectual capacity and academic achievement.

(G) Claimant's receptive and expressive language was also considered by Drs. Himber and Munguia. Claimant was found to not be substantially disabled in this major life activity. Expressive language deficits include errors in tense, limited vocabulary, difficulty recalling words, or producing sentences with developmentally appropriate length

or complexity, and general difficulty expressing ideas. Receptive language deficits include difficulty understanding words or sentences. Drs. Himber and Munguia considered their own observations, parents report, and the reports of speech and language professionals which placed Claimant in the average to above average range in all areas of expressive and receptive language. Parents disagreed with several statements attributed to them in Drs. Himber and Munguia's report regarding Claimant's language development.

(H) The capacity for independent living involves everyday activities that promote self reliance and minimize dependence on others. According to Drs. Himber and Munguia, this category involves the ability to do chores around the house, participate in community activities, and shared roles. This activity was evaluated based on parent reports and Drs. Himber and Munguia's observations of Claimant. While Drs. Himber and Munguia reported that Claimant is able to get a snack when hungry and ask for preferred food items, parents deny reporting these behaviors. According to parents, Claimant will run away at the mall and displays no safety awareness. Drs. Himber and Munguia concluded Claimant did not meet the criteria for substantial disability in the area of capacity for independent living.

(I) Drs. Himber and Mungia noted that information provided by parents is supportive of a diagnosis of Autistic Disorder. However, based on their observations and the result of the ADOS, they were of the opinion that Claimant did not meet the DSM-IV criteria for Autistic Disorder. They believed the more appropriate diagnosis was PDD-NOS. Drs. Himber and Munguia conclude that regardless of diagnosis, Claimant is not eligible for Lanterman Act services because he is not substantially disabled in at least three areas of major life activity.

Regional Center Witnesses

23. (A) Dr. Himber testified as a member of the RCOC eligibility review team and as one of the preparers of the TDA. Dr. Himber is the head of the Regional Center clinical team, a member of eligibility review teams, and has extensive training and experience with individuals with developmental disabilities, especially autism. Based on his education, training and experience, Dr. Himber was qualified to give the expert opinions contained in his testimony. Although parents allege there were errors in the TDA regarding information they provided Regional Center, those discrepancies were insufficient to undermine Dr. Himber's credibility.

(B) Dr. Himber explained that eligibility for Lanterman Act services requires four things: (1) an eligible diagnosis, (2) substantial disability in three major life activities, (3) the disability continues or can be expected to continue indefinitely, and (4) originates before the age of 18 years. Dr. Himber acknowledged that Claimant was medically diagnosed with autism by Dr. Hannauer but, even accepting that diagnosis, he opined that Claimant is not eligible for Lanterman Act services. Dr Himber testified that he considered both objective evidence (test results) and subjective evidence (parent report, observations made of Claimant) in concluding Claimant is not substantially disabled in three major life activities. The best predictors for long term development in a child with autism is language and cognitive. Claimant has significant strengths in these two areas, indicating a good

prognosis. Given his strengths, Dr. Himber cannot say that Claimant will be substantially disabled in three major life activities indefinitely. According to Dr. Himber, Claimant is a very bright child who has enormous potential and can be expected to overcome his current deficits.

(C) Dr. Himber acknowledged that Claimant's deficits in self-direction spill over and affect his functioning in other areas. Nonetheless, Claimant is learning and has strong language skills. And, although Claimant has some problems in self-care, those problems do not rise to the level of a substantial disability expected to continue indefinitely and requiring multidisciplinary planning. Despite problems in self-direction, including difficulty sitting still, focusing and attending to instruction, Claimant is learning as evidenced by his scores on the WIAT.

(D) In Dr. Himber's experience, because of the severity of the symptoms necessary for a diagnosis, the presence of autism is generally agreed to by multiple evaluators over time. In this case, the evaluators who assessed Claimant were not in agreement that he has autism.

24. (A) Dr. Munguia also testified in support of Regional Center's decision to deny Claimant's request for eligibility. Dr. Munguia is a licensed psychologist and has served as a staff psychologist for RCOC for one year. Her duties include reviewing cases for Lanterman Act eligibility and administering standardized tests. Prior to her employment by RCOC, Dr. Munguia was employed as a psychology assistant with Inland Regional Center. She participated in the eligibility review team for Claimant and in the TDA with Dr. Himber. Although parents allege there were errors in the TDA regarding information they provided Regional Center, those discrepancies were insufficient to undermine Dr. Munguia's credibility.

(B) Dr. Munguia reviewed Claimant's records and initially determined Claimant was not eligible for Lanterman Act services. Like Dr. Himber, Dr. Munguia testified she found Claimant not eligible for services even after considering Dr. Hannauer's report and conducting the TDA. She described Claimant as very interactive and engaging in play during the administration of the ADOS-2. She noted he was very active, suggesting no disability in the major life activity of mobility. With respect to learning, Dr. Munguia noted Claimant is in the average to very superior range intellectually and is performing well in school. She testified that regional centers consider a standard score of 70 or below to be in the "substantially disabled" range. Dr. Mungia also testified she reviewed speech and language reports showing Claimant has average to above average receptive and expressive language skills.

(C) Dr. Munguia found Claimant was not substantially disabled in the area of self-care. Parents pointed out that the TDA incorrectly reported Claimant does not have toileting accidents when in fact he does. Dr. Munguia noted that it is not unusual for children Claimant's age to have toileting accidents and that many children his age need assistance with dressing, bathing and dressing. Such needs are not a predictor of lifelong problems with self-care. Parents pointed out that Claimant does not know how or when to take his

medication. Dr. Munguia stated this is not unusual for a six year old child whom she would expect to rely on parents for medication.

(D) Dr. Munguia addressed the administration of the CARS and the ADOS-2. The CARS is a screening tool, not intended to be used to diagnose Autistic Disorder. The ADOS-2 is a diagnostic tool comprised of 4 modules. Dr. Munguia has administered over 600 ADOS. Based on the result of the ADOS-2 and all the other available information, Dr. Munguia testified Claimant has symptoms of autism, but does not have Autistic Disorder. She testified PDD-NOS is the better diagnosis.

(E) Dr. Munguia also testified that eligibility for special education on the basis of autism is not the same as a diagnosis of autism for Lanterman Act eligibility. Similarly, eligibility for special education service for speech and language is different from finding that an individual is substantially disabled in the area of expressive and receptive language under the Lanterman Act. Dr. Munguia also explained that pragmatic language is the language used in social interaction and is not the same as expressive and receptive language as used in the Lanterman Act.

25. (A) Dr. Kyle Pontius is a staff psychologist and has worked for the RCOC for 10 years. He is responsible for evaluating applications for eligibility and consultation with service coordinators regarding consumer services, among other duties. Dr. Pontius reviewed the prior test results, reports and evaluations, but did not personally evaluate Claimant. His testimony was found to be credible.

(B) Dr. Pontius testified about the use of the DSM-IV in diagnosing mental disorders. Specifically, Dr. Pontius pointed to the introduction to the DSM-IV which provides in pertinent part, "The diagnostic categories, criteria, and textual descriptions are meant to be employed by individuals with the appropriate clinical training and experience in diagnosis. It is important that the DSM-IV not be applied mechanically by untrained individuals. The specific diagnostic criteria included in the DSM-IV are meant to serve as guidelines to be informed by clinical judgment and are not meant to be used in cookbook fashion." According to Dr. Pontius, clinical expertise is needed to see symptoms as a whole. For example, he considered Dr. Armstrong and Dr. Hannauer's evaluations, which were about one year apart and yielded a different diagnosis. He noted some differences in the history of present illness reported by Dr. Armstrong and Dr. Hannauer, the limited use of psychometrics in Dr. Hannauer's report, and questions regarding what diagnostic criteria Dr. Hannauer and Ms. Schoenwald may have used. In her report Dr. Hannauer listed the DSM-IV criteria for Autistic Disorder but she did not identify what criteria Claimant met. Moreover, Dr. Pontius was concerned about Dr. Hannauer's findings because she relied on Ms. Schoenwald's assessment of Claimant, which did not use DSM-IV criteria. As noted by Dr. Pontius, Ms. Schoenwald paraphrases the DSM-IV diagnostic criteria for Autistic Disorder, noticeably lowering the qualitative and quantitative level of symptoms required for a diagnosis of Autistic Disorder. For example, under the DSM-IV when considering whether an individual has "qualitative impairment in social interaction" one factor considered is whether the individual has "marked impairment in the use of multiple non-verbal behaviors such as eye-to eye gaze, facial expression, body posture, and gestures to regulate social

interaction. . .” Ms. Schoenwald paraphrased this as “Does not use body language when interacting (e.g. no eye contact, no change of facial expression, maintains a rigid body posture)” According to Dr. Pontius, the use of the word “marked” in the DSM-IV requires the presence of the symptom to such a degree that it stands out as creating a disability across different times and situations. The degree of impairment must be more than just not normal. Dr. Pontius also questioned the qualification of Ms. Schoenwald to administer the ADOS. According to Dr. Pontius, the administration of the ADOS is beyond the training and licensure of a nurse practitioner. A determination of a DSM-IV diagnosis requires the use of clinical judgment and the criteria are meant to be used by individuals with appropriate clinical training. Diagnosis requires more than merely checking off a symptom on a checklist.

(C) With respect to Claimant’s functioning, Dr. Pontius considered Claimant substantially disabled in the area of self-direction. He noted Claimant’s high intellectual capacity and academic achievement, and his average to above average expressive and receptive language abilities in concluding Claimant is not substantially disabled in learning and expressive and receptive language. He acknowledged Claimant has some deficits in self-care and capacity for independent living, but concluded that these deficits are not atypical for a six year old child.

(D) According to Dr. Pontius, a diagnosis of PDD-NOS is given to an individual who belongs under the autism spectrum but who does not meet the criteria of Autistic Disorder or Asperger Disorder. Unlike Autistic Disorder and Asperger Disorder, the DSM-IV does not contain a list of criteria for PDD-NOS. PDD-NOS may be used when symptoms are present but less severe than is required for Autistic Disorder and Asperger Disorder.

(E) Dr. Pontius acknowledged there are discrepancies in various reports about Claimant’s functioning. He testified such differences happen all the time; parents, teachers and other observers often describe a child’s functioning differently. Dr. Pontius did not consider such discrepancies unusual, nor were they sufficient to change his opinion that Claimant is not eligible for Lanterman Act services.

Parent’s Testimony

26. (A) Claimant’s parents believe their son has autism, and should be eligible for Lanterman Act services. Parents testified about many of the behaviors and challenges presented by Claimant. For example, he repeats what he reads in books or sees in movies, will watch a movie over and over, is unable to have a conversation with his father, is unable to use language to interact socially, and is unable to tell his father why he likes a video or what he gets out of it. Claimant plays alone, will not play with a toy, is unable to select from between two toys, and runs away. Parents described impulsiveness, poor body awareness, and a lack of self awareness. In class, parents state Claimant walks around, is out of his chair a lot, and engages in self-stimulatory behavior. According to parents, he has problems dressing and problems with hygiene and toileting. Parents testified Claimant did not talk until he was two, walked at 17 months and stood at two and a half years. Parents are concerned

that while Claimant learns quickly, he is unable to put what he learns together. Parents compared the DSM-IV criteria for Autistic Disorder with information contained in some of the reports and evaluations and their observations so as to conclude that there is evidence to support a diagnosis of Autistic Disorder.

(B) Parents also questioned RCOC witnesses in an effort to show Claimant's behaviors, characteristics, and challenges meet the diagnostic criteria for Autistic Disorder. Parents also sought to elicit specific criteria, standards, or a list of characteristics that define the meaning of "substantially disabled" under the Lanterman Act. Drs. Himber, Munguia and Pontius testified there are not specific criteria, or precise standards, or a list of characteristics that may be applied to determine whether an individual is substantially disabled in a major life activity. It was pointed out by several witnesses that a standard score below 70 on a relevant measure of major life activity is indicative of substantial disability, but not the only measure that should be applied when making such a determination. The disability must have a major impact on an individual's functioning and be expected to continue indefinitely.

Autism

27. (A) The Lanterman Act includes autism as one of several conditions that come within the definition of development disability. (§ 4512, subd. (a).)

(B) The DSM-IV notes that, "The essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activities and interests."

(C) The DSM-IV diagnostic criteria for "Autistic Disorder" are:

A. A total of six (or more) items from (1), (2), and (3), with at least two from (1) and one each from (2) and (3)

1. qualitative impairment in social interaction, as manifested by at least two of the following:

a. marked impairments in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body posture, and gestures to regulate social interaction;

b. failure to develop peer relationships appropriate to developmental level;

c. a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people, (e.g., by a lack of showing, bringing, or pointing out objects of interest);

d. lack of social or emotional reciprocity;

2. qualitative impairments in communication as manifested by at least one of the following:

a. delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime);

b. in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others;

c. stereotyped and repetitive use of language or idiosyncratic language;

d. lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level.

3. restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least two of the following:

a. encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus;

b. apparently inflexible adherence to specific, nonfunctional routines or rituals;

c. stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements);

d. persistent preoccupation with parts of objects.

B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction; (2) language as used in social communication; and (3) symbolic or imaginative play.

C. The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder.

LEGAL CONCLUSIONS

1. In a proceeding to determine eligibility for Lanterman Act services, the burden of proof is on the Claimant to establish he or she has a "developmental disability" within the meaning of section 4512, subdivision (a). The standard is a preponderance of the evidence. (Evid. Code, § 115.)

2. Under the Lanterman Act, the State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. (§ 4501.) As defined in the Lanterman Act, a developmental disability is a disability that originates before age 18, that continues or is expected to continue indefinitely and that constitutes a substantial disability for the individual. Developmental disabilities include

mental retardation, cerebral palsy, epilepsy, autism, and what is commonly known as the "fifth category" – a disabling condition found to be closely related to mental retardation or requiring treatment similar to that required for mentally retarded individuals. (§ 4512, subd. (a).) Handicapping conditions that consist solely of psychiatric disorders, learning disabilities or physical conditions do not qualify as developmental disabilities under the Lanterman Act. (California Code of Regulations, title 17, section 54000, subdivision (c).[11])

3. Substantial disability is defined by regulation to mean:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;
(B) Learning;
(C) Self-care;
(D) Mobility;
(E) Self-direction;
(F) Capacity for independent living; and
(G) Economic self sufficiency.

(CCR, § 54001, subd. (a)(2).)

4. Handicapping conditions that are solely psychiatric disorders, solely learning disabilities, or solely physical in nature are excluded from the definition of developmental disability. These three exclusions from the definition of "developmental disability" under CCR section 54000 are defined further: Impaired intellectual or social functioning which originated as a result of a psychiatric disorder or a treatment given for such a disorder, if it was the individual's sole disorder, would not be considered a developmental disability. "Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning has been seriously impaired as an integral manifestation of the disorder." Nor would an individual be considered developmentally disabled whose only condition was a learning disability (a significant discrepancy between estimated cognitive potential and actual level of educational performance) which is not "a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss." Also excluded are solely physical conditions such as congenital anomalies or conditions acquired through disease, accident or

[11] All further references to a section of the California Code of Regulations, title 17, will be designated as CCR section.

faulty development, not associated with a neurological impairment, that result in a need for treatment similar to that required for mental retardation. (CCR, § 54000, subd. (c).)

5. Claimant does not have cerebral palsy, or epilepsy. Claimant does not have mental retardation or a condition closely related to mental retardation or requiring treatment similar to that required by individuals with mental retardation. (§ 4512, subd. (a).)

6. (A) This dispute centers on whether Claimant has autism and if so, whether he also has a substantial disability in three major life activities so as to establish eligibility for Lanterman Act services. The professionals who have evaluated Claimant are in disagreement about the proper diagnosis. Drs. Himber, Munguia, and Pontius concluded that Claimant most likely has PDD-NOS. Dr. Armstrong concluded Claimant has Asperger Disorder. Although Asperger Disorder a Pervasive Developmental disability and is on the autism spectrum, it is not autism. Drs. Hannauer and Gittleson concluded Claimant has Autistic Disorder. The District concluded Claimant is eligible for special education services under the category of autism. There is no dispute among professionals that Claimant has a disorder on the autism spectrum. Disorders on the autism spectrum include autism or Autistic Disorder, Asperger Disorder and PDD-NOS. Only autism or Autistic Disorder is eligible for Lanterman Act services.

(B) Dr. Himber acknowledged Claimant has a medical diagnosis of autism, and that according to parents' description, Claimant would meet the diagnostic criteria for Autistic Disorder. However, he credibly testified that even given this diagnosis, Claimant is not eligible for Lanterman Act services because he is not substantially disabled in three major life activities. Drs. Himber, Munguia, and Pontius all acknowledged Claimant is disabled in self-direction and though this may affect other major life activities such as learning, self care and capacity for independent living, Claimant is not substantially disabled in those areas.

7. By reason of Factual Findings 1 through 27 and Legal Conclusions 2 through 6, given the considerable conflict with respect to Claimant's diagnosis, it cannot be said that Claimant has autism or Autistic Disorder. Moreover, it also has not been established that Claimant has a substantial disability in three or more major life activities that can be expected to last indefinitely. Although the evidence showed that Claimant has some deficits in self-care and capacity for independent living, these are not atypical for a child his age, are not expected to last indefinitely, and do not support a finding of substantial disability in these areas. Moreover, evidence produced by both Claimant and Regional Center, including psychological reports prepared by Dr. Gittleson, Dr. Armstrong, Mr. Dierck, and Ms. Eberhard and speech and language reports prepared by Ms. Campen, Mr. Roberson and Ms. Hsu, and witness testimony all demonstrate that Claimant has average to very superior intellectual capacity, academic skills, and expressive and receptive language skills, all of which indicate a good prognosis for future development.

(8) It was not established that Claimant has a developmental disability as defined in the Lanterman Act by reason of autism or on any other basis.

ORDER

Regional Center's determination that Claimant is not eligible for services under the Lanterman Act is sustained; Claimant's appeal is denied.

DATED: February 26, 2013

DEBORAH M. GMEINER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS A FINAL ADMINISTRATIVE DECISION. BOTH PARTIES ARE BOUND BY THE DECISION AND EITHER PARTY MAY APPEAL THIS DECISION TO A COURTOF COMPETENT JURISDICTION WITHIN NINETY DAYS.